UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
---x Civil Action No. 1:07-CV-0746 (LEK/RFT)

JEFFREY PROVENZANO, THOMAS BENJAMIN and MONICA AGOSTO, on behalf of themselves and all others similarly situated.

Plaintiffs

-against-

THE THOMSON CORPORATION and WEST PUBLISHING d/b/a BARBRI,

Defendants

---x

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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PRELIMINARY STATEMENT

The Plaintiffs Jeffrey Provenzano, Thomas Benjamin, and Monica Agosto originally commenced the herein action in the Supreme Court of the State of New York, County of Albany. The Plaintiffs are each attorneys duly admitted to practice law in the State of New York. The Plaintiffs are each a graduates of Albany Law School. In preparation for the New York State bar examination each of the Plaintiffs purchased a "BAR/BRI" bar review course which is sold by the Defendants.

In their amended complaint the Plaintiffs allege that the manner in which the BAR/BRI bar review program is advertised violate New York General Business Law Section 349, which prohibits businesses from using any deceptive trade practices, which may effect consumers. The Plaintiffs further allege that they were fraudulently induced by the Defendants to purchase the full BAR/BRI New York bar review course. After receiving service of the second and amended complaint the Defendants claimed that the herein action was removable to federal court based upon the Class Action Fairness Act ("CAFA"). Via motion dated August 17, 2007, the Defendants named herein moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for an alleged failure to state a cause of action. the Plaintiffs submit the herein memorandum of law in opposition to said motion to dismiss.

ARGUMENT

I. THE FEDERAL PLEADING STANDARD

Fed. R. Civ. P. 8(a) sets forth as follows:

> "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds to support it (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded."

II. STANDARDS FOR DECIDING A MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Fed. R. Civ. P. 12(b)(6) allows a court to dismiss a complaint upon a demonstration of a failure to state a claim upon which relief can be granted. In deciding a Fed. R. Civ. P. 12(b)(6) motion, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 2007 WL 1989336, at *5 (2d Cir. Jul. 11 2007); Johnson & Johnson v. Guidart Corp., 2007 WL 2456625 (S.D.N.Y. Aug. 29, 2007). In deciding a motion to dismiss, a court merely assesses the legal feasibility of the complaint and not the evidence which might be offered in support thereof. Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d168, 176 (2d Cir. 2004). However, a court may dismiss an action pursuant to Fed. R. Civ. P. 12(b)(6) *only* if "it appears beyond a reasonable doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." Branum v. Clark, 972 F.2d 698, 705 (2d Cir. 1991); Jaghory v. New York State Dept. of Educ., 131 F.3d 326, 329 (2d Cir. 1997).

As Fed. R. Civ. P. 8 equates to a simplified standard for pleading, the Supreme Court has held that a federal court may dismiss a complaint only if it is clear that no relief could be granted under *any* set of facts that could be proved consistent with the allegations. Swierkicwicz v. Sorema, N.A., 534 U.S. 506, 514, 122 S. Ct. 992 (2002).

In addition to the pleadings, the court, when ruling upon a motion to dismiss a complaint, must consider documents attached to the complaint as an exhibit or incorporated in it by reference and matters of which judicial notice may be taken. Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002); Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991).

Importantly, the issue in regard to a Fed. R. Civ. P. 12(b)(6) motion is not whether a plaintiff may ultimately prevail, but rather, whether the plaintiff is entitled to offer evidence to support his or her claim(s). The court does not weigh the evidence that might be presented at trial. Instead, the court must merely determine whether the complaint itself is legally sufficient. Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995).

III. THE NEW YORK STATUTE PROHIBITING THE USE OF DECEPTIVE TRADE PRACTICES

New York General Business Law Section 349 (hereinafter "Sec. 349") broadly prohibits businesses from using any deceptive and/or misleading business tactics, which may negatively effect consumers. Sec. 349 prohibits "deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service" and was intended to be broadly applicable, extending far beyond the reach of common law fraud. Furthermore, the term“consumer intended conduct” has been liberally construed. New York v. Feldman, 210 F. Supp. 2d 294 (S.D.N.Y. 2002).

A plaintiff alleging a Sec. 349 violation must establish: 1) deceptive acts directed at consumers; 2) that said acts are misleading in a material way; and 3) that the plaintiff has been injured. Bildstein v. Mastercard International, Inc., 2005 WL 1324972 (S.D.N.Y.)(denying Fed. R. Civ. P. 12(b)(6) motion to dismiss alleging plaintiff therein failed to plead facts establishing consumer-oriented conduct, actionable deception and actual injury). Importantly, the Second Circuit has held that an action under Sec. 349 is not subject to the pleading-with-particularity requirements of Fed. R. Civ. P. 9(b) but need only meet the “bare-bones” notice-pleading requirements of Fed. R. Civ. P. 8(a). Pelman v. McDonald’s Corp., 396 F.3d 508, 511 (2d Cir. 2005)(describing federal pleading requirement as “bare-bones notice pleading” and further recognizing that “actual reliance” is unnecessary for a Sec. 349 claim). *See also,* Barkley v. Olympia Mortgage Co., 2007 WL 2437810 (E.D.N.Y. Aug. 22 2007)(denying motion to dismiss Sec. 349 claim).

The “consumer oriented” requirement of Sec. 349 is strictly applied. Private contract disputes unique to the parties do not fall within the ambit of Sec. 349. Lava Trading, Inc. v. Hartford Fire Ins., 326 F. Supp. 2d 434 (S.D.N.Y. 2004); same Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20 (Ct. App. 1995). For purposes of Sec. 349 claim a plaintiff must show that the defendant has engaged in acts or practices that are deceptive in a material way showing that a *reasonable consumer* would have been mislead by the defendant’s conduct. S.Q.K.F.C., Inc. v. Bell Atlantic TriCon Leasing Corp., 84 F.3d 629 (2d

Cir. 1996) same Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra.

Plaintiffs recognize that Fed. R. Civ. P. 12(b)(6) allows this federal court to dismiss their amended complaint for "failure to state a claim upon which relief can be granted." However, the court herein cannot dismiss Plaintiffs' amended complaint. Indeed, for the reasons set forth herein, it does not appear beyond a reasonable doubt when the amended complaint is liberally construed, that the Plaintiffs can prove no set of facts which would entitle them to relief under Sec. 349 and the New York law prohibiting fraudulent inducement. Furthermore, in construing the herein amended complaint, this court must accept all factual allegations in the amended complaint as true. This court must draw all reasonable inferences from those allegations in the light most favorable to the Plaintiffs.

The federal rules have simplified standards for pleading. The Supreme Court mandates that this federal court may dismiss the herein amended complaint only if it is clear that no relief under the Sec. 349 and fraudulent inducement could be granted under any set of facts that could be proved consistent with the allegations that the Defendants have violated Sec. 349 and the New York law prohibiting fraudulent inducement.

This court must also consider the portions of the BAR/BRI website, which are referenced in, and attached to, the Plaintiffs' amended complaint. Indeed, the Second Circuit Court of Appeals mandates that, although this court is limited to the facts set forth in the amended complaint, the amended complaint includes portions of the BAR/BRI website, which are attached as exhibits to the amended complaint and which are incorporated by reference therein.

The issue in regard to the defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss is not whether the Plaintiffs may ultimately prevail in regard to their Sec. 349 and fraudulent inducement claims. Rather, the issue is whether the Plaintiffs are entitled to offer evidence to support their claims. Furthermore, this court does not weigh the evidence that might be presented at trial herein. Instead, this court must merely determine whether the amended complaint itself is legally sufficient to set forth claims under Sec. 349 and fraudulent inducement.

Sec. 349 claim- Sec. 349 broadly prohibits the Defendants herein from using any deceptive and/or misleading business tactics, which may negatively affect persons who have attended a New York law school and who may desire to purchase a review course in preparation for the New York State bar examination. Sec. 349 prohibits the deceptive acts and practices in the conduct of the New York bar review business. Moreover, Sec. 349 was intended to be broadly applicable so as to cover the business of bar review in the State of New York. Sec. 349 extends far beyond the reach of the common law fraud claim alleged in the amended complaint.

As the term“consumer intended conduct” has been liberally construed by courts, the candidates for the New York State bar exam must be deemed consumers and the wrongful conduct of the Defendants herein must be deemed consumer intended. The Plaintiffs, in alleging their Sec. 349 violation, have established: 1) deceptive statements and misrepresentations directed at law students who are the *main* purchasers of the BAR/BRI bar review materials which; 2) are misleading in a material way in that they convey the false impression that a person graduating from a New York law school cannot pass the New York state bar exam without purchasing a BAR/BRI review course; and 3) Plaintiffs have been injured by paying an inflated price to BAR/BRI .

Importantly, the Second Circuit mandates that the herein action under Sec. 349 is not subject to the pleading-with-particularity requirements of Fed. R. Civ. P. 9(b) but need only meet the bare-bones notice-pleading requirements of Fed. R. Civ. P. 8(A). Furthermore, the Plaintiffs need not allege that they actually relied upon the false statements and misrepresentations contained in the BAR/BRI advertising mantra as same is unnecessary for their herein Sec. 349 claim. As the "consumer oriented" requirement of Sec. 349 is strictly applied there is no private contract disputes unique to the Plaintiffs and the Defendants herein as same would not fall within the ambit of Sec. 349.

For purposes of their Sec. 349 claims, the Plaintiffs have shown that the Defendants have engaged in a barrage and bombardment of advertising acts and practices, which exploit the negatives of the law school experience, the New York State bar exam, and the false perception that one must purchase a BAR/BRI bar review course in order to pass the New York state bar exam. These advertising acts and practices are deceptive in a material way in that: 1) a graduate of a New York law school can pass the New York bar exam without purchasing any BAR/BRI product; and 2) for those who may choose to purchase a BAR/BRI product there is no need to pay an inflated price for BAR/BRI products.

In short, the Plaintiffs have shown herein that a *reasonable* graduate of a New York law school, needing to pass arguably the most difficult bar exam in the country with which he or she has absolutely no prior experience taking, who is usually deep into debt, barraged with the BAR/BRI mantra from day one of law school, and absolutely needing to pass the New York State bar examination in order to practice law in the State of New York, would have been misled by BAR/BRI's false and deceptive advertisement mantra wherein it presents itself as the absolute authority on *what to expect* on the New York state bar exam and *how to confront it* so passing is virtually guaranteed. Importantly, in their motion to dismiss the amended complaint, the Defendants *never* challenge the factual assertions set forth in paragraphs “11” through “24” of the amended complaint, which set forth facts regarding *how* BAR/BRI indoctrinates law students with false statements and misrepresentations commencing from the time period starting just before entering law school and continuing throughout the student’s 3 to 4 year law school stint. These factual assertions alleged by the Plaintiffs must be considered by the Court to determine the “reasonable” requirement in regard to the deceptiveness of the Defendants’ false statement and misrepresentations.

IV. THE DEFENDANTS MISSTATE THE EFFECT OF THE RULING OF THE UNITED STATES SUPREME COURT AS SET FORTH IN THE TWOMBLEY

A simple review of the Defendants’ motion to dismiss reveals that the bulk of said motion is based upon an intentional misapplication of the holding by the United States Supreme Court in the matter of Bell Atl. Corp. v. Twombley, 127 S.Ct. 1955, 1964-69, which was issued on May 21, 2007. Defendants use the “requires more than labels and conclusions” language from Twombley to falsely imply that Plaintiffs in a federal action now must *prove* their case via their complaint rather than *plead* their case via their complaint. Such a result is absurd, and no such effect can be implied from the Twombley ruling.

As properly recognized by the Defendants on page 4 of their Memorandum of Law, the concern of the Supreme Court in Twombley was to reel in the “..unless it appears beyond doubt that Plaintiff can prove no set of facts to support his claim...” standard for dismissing a complaint as set forth in Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957). The Twombley decision seeks to prevent the filing of groundless complaints designed to essentially harass defendants into settling claims solely for economic considerations, i.e. to avoid the cost of legal defense. However, concerns for frivolous lawsuits are best addressed by Fed. R. Civ. P. 11 which, specifically provides for sanctions (including monetary) for filings which are being presented "...for any improper purpose..." See Fed. R. Civ. P. 11(b).

On the contrary, there is absolutely no basis for holding that the amended complaint herein constitutes a groundless complaint designed to baselessly harass the Defendants. In fact, the herein action is *crucial* to correct an important wrong: the duping of hopeful attorneys *by* attorneys. It is patently outrageous that a company owned by a foreign corporation is allowed to create a scenario where the first experience of New York law school graduates with the world of legal practice is to have their pockets picked based upon false, deceptive, and dastardly indoctrination tactics employed against vulnerable and unsuspecting law students which commences prior to beginning their law school experience and continuing for years afterward.

The Plaintiffs are also pleased that the Defendants properly state the Second Circuit Court of Appeals interpretation of Twombley as set forth in Igbal v. Hasty, 490 F.3d 143, 155, 157-58 (2d Cir. 2007)(i.e. amplifying a claim with some factual allegations when such amplification is needed to render the claim "plausible"). Plaintiffs are further pleased that Defendants properly set forth the language of the Second Circuit emanating from ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 2007 WL 1989336, at *5 (2d Cir. 2007)(quoting Twombley)(i.e....plaintiff must provide grounds for his claim through facts sufficient to "raise a right for relief beyond the speculative level."). Indeed, the amended complaint herein is amplified enough with facts to cause a sonic boom. Furthermore, said facts raise a right for relief way beyond the speculation level.

The Defendants have deftly and slickly combined the "plausible" test set forth in Igbal, the "beyond speculation level" test set forth in ATSI Commc'ns, Inc. and the "objectively misleading" test for a Sec. 349 claim, as set forth by the New York State Court of Appeals in Oswego Laborers' Local 214 Pension Fund, to essentially set forth their arguments which they would advance *at trial*. In fact, via their frivolous motion to dismiss the amended complaint, it is the Defendants who use conclusory statements as an alleged basis to support their baseless contention that the amended complaint fails to state any cause of action.

However, it is not plausible to conclude that the Defendants have complied with the mandates of Fed. R. Civ. P. 12(b)(6). Their arguments against the amended complaint are not only mere speculation but also constitute a desperate attempt to attack and destroy credible legal claims. Indeed, the Defendants' arguments are objectively misleading. For example, at the bottom of page 7 of the Defendants' Memorandum, they state "Defendants examine each of the plaintiffs' claims of deception in turn." In conjunction therewith, and on page 8 of the Defendants' Memorandum, they reference "1. Extent of Marketing" Thereafter, they refer to the allegations in the amended complaint describing students as being "bombarded" and "barraged" and that BAR/BRI "exploits the pressures of law school." Incredibly, though, *and without any denial that BAR/BRI is guilty of these despicable actions*, the Defendants, with the type of gall that can be exhibited by an entity which *bombards, barrages and exploits* persons seeking to enter the noble profession of attorney at law, states "...these allegations make out nothing more than a claim of thorough marketing alleging that there is "nothing deceptive about these practices", "no representation of omissions alleged in these paragraphs at all." Yet the amended complaint clearly sets forth these dastardly and deceptive tactics to demonstrate that the Plaintiffs, as persons who attended a New York law school, have each been exposed to the types of deceptive and misleading statements as those which are set forth on the BAR/BRI website exhibits to the amended complaint.

The Defendants argue that the amended complaint fails because there is no allegations as to what "these Plaintiffs" actually heard (pages 8-9 of Defendants Memorandum of Law). However, this argument is refuted by the Defendants' own admission that BAR/BRI barrages, bombards, and exploits law students. The amended complaint clearly sets forth that each Plaintiff graduated from Albany Law School (see paragraph 4, 5, and 6 of the amended complaint). Paragraph 11 of the amended complaint expressly sets forth that each Plaintiff is part of a large group of law students.

Uniform advertising mantras, set forth in various similar forms of BAR/BRI advertisements, support a claim for violations of Sec. 349. See Taylor v. American Bankers Ins. Group, 267 A.D.2d 178 (App. Div. 1st Dept.1999)(holding that, while presented in a variety of forms and promotions, solicitations "did not differ materially". The predominant focus of the litigation was the defendants deceptive trade practice. The general practice, and the question of whether it constitutes a consumer fraud, affects thousands of consumers who responded to the ads and paid money. Although the defendants contended that they use a variety of forms and promotions, there was ample justification for the trial court's finding that the solicitations in question did not differ materially. Given the nature and uniformity of defendants' deceptive offers, any matter relating to individual reliance and causation are relatively insignificant, if not irrelevant, and, as such, did not preclude class certification.).

Moreover, on page 8 of its Memorandum the Defendants state that the Plaintiffs "...largely make no allegations that BAR/BRI misrepresented the nature or content of its course." A simple review of the amended complaint renders the assertion patently ridiculous. In fact, the Plaintiffs set forth *numerous* assertions which set forth a plausible, beyond speculation, argument and allegations that the Defendants have violated two laws of the State of New York.

V. OTHER COURTS HAVE PLACED THE *TWOMBLEY* RULING IN CONTEXT

Other courts considering a Fed. R. Civ. P. 12(b)(6) motion have considered the Twombley ruling in context with the massive body of federal case law regarding Fed. R. Civ. P. 12(b)(6). Importantly, the Sixth Circuit Court of Appeals has recognized that "significant uncertainty as to the intended scope of the decision in Twobly persists particularly regarding its reach beyond the antitrust context." Weisbarth v. Geuauga Park Dist., 2007 WL 2403659 (6th Cir. Aug. 24, 2007) citing Igbal. The Seventh Circuit Court of Appeals has also expressed doubt that Twombley "..changed the level of detail required by notice pleading". E.E.O.C. v. Concentra Health Services, Inc., 2007 WL 2215764 (7th Cir. Aug. 03 2007).

A sister District Court in the Second Circuit has also recognized that, even after Twombly, the issue on a motion to dismiss is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to support the claims." OBG Technical Services, Inc. v. Northrop Grumman Space & Mission Systems Corp., 2007 WL 2480362 (D. Conn. Aug. 30, 2007) citing Desiano v. Warner-Lambert Co., 326 F.3d 339, 347 (2d Cir. 2003). Another sister Circuit District Court in the Second Circuit has, since Twombley, affirmed that the federal rules allow simple pleadings and rely on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. Naylon v. Billitier, 2007 WL 2580496 (W.D.N.Y. Sep. 4, 2007) citing Phillip v. Univ. of Rochester, 316 F.3d 508, 511 (2d Cir. 2005).

Additionally, since issuing its Twombley decision, the Supreme Court has stated that specific facts are not necessary to satisfy the simplified federal pleading standard. Instead, the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. Erikson v. Pardus, 127 S.Ct. 2197, 2200 (June 4, 2007); Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002). The Second Circuit has stated that "fair notice" is "that which will enable the adverse party to answer and prepare for trial. Wynder v. McMahon, 360 F.3d 73, 79 (2d Cir. 2004). The Plaintiffs herein have met these standards.

Importantly, though, this Court has demonstrated a clear understanding of allowing a Plaintiff to prove his or her claim despite the filings of Fed. R. Civ. P. 12(b)(6) motions to dismiss. Brady v. Dammer, 2005 WL 1871183 (N.D.N.Y.)(despite striking complaint for failure to comply with Rule 8 Judge Lawrence A. Kahn *sua sponte* granted plaintiff leave to file an amended complaint that complies with Rule 8). Casale v. Reo, 2005 WL 1660743 (N.D.N.Y.)(Judge Lawrence A. Kahn denied a motion to dismiss in regard to a claim where plaintiff "may have an uphill battle" in proving an element thereof). In each of these cases Judge Kahn recognized that Rule 8 requires a "bare-bones" notice pleading. Additionally, the Bankruptcy Court for this district has not allowed the Twombley decision to encroach upon well-established principals of law concerning a Fed. R. Civ. P. 12(b)(6) motion to dismiss. In re Franklin Indus. Complex, Inc., 2007 WL 2509709 (Bkrtcy. N.D.N.Y. Aug. 30, 2007) denying motion to dismiss as "Defendants have failed to show that the Plaintiff's Complaint has not alleged enough facts to state a claim to relief that is plausible on its face."

VI. THE DEFENDANTS' CLAIMS OF "PUFFING" ARE WITHOUT MERIT

The Defendants argue that their false statements – as alleged in Plaintiffs' complaint – are not actionable as same constitutes mere "puffing". This contention is without merit. As Defendants own cited cases establish that "puffing" cannot be found if the statements at issue can be proven either true or false. Cytyc Corp. v. Neuromedical Systems, Inc., 12 F. Supp. 2d 296 (S.D.N.Y. 1998)(holding that subjective claims *about products*, which cannot be proven either true or false, are not actionable under Lanham Act, a federal statute prohibiting deceptive statements which applies to an analysis of Sec. 349). Thus, the sufficiency of a claim must be judged on the basis of the challenged statements read in their entirety and in context. Sandoz Pharmaceuticals v. Richardson-Vicks, Inc., 902 F.3d 222, 229-230 (3d Cir. 1990)(context is important in evaluating the message conveyed); Lipton v. Nature Co., 71 F.3d 464, 474 (2d Cir. 1995) (finding claim of "thorough" research to be mere unactionable puffing); Bose Corp. v. Linear Design Labs, Inc., 467 F.2d 304, 310-311 (2d Cir. 1972) (holding claim that "countless hours of research" has produced superior product is non-actionable puffing.).

Here, the Defendants also attempt to rely upon Time Warner Cable, Inc. v. DirecTV, Inc., 2007 WL 2263932, at *11-12 (2d Cir. Aug. 9, 2007), wherein the Second Circuit set forth a "subjective claim about products, which cannot be characterized as true or false" test and a "general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion" test. However, as explained below, each of these tests are inapplicable herein.

The Plaintiffs' amended complaint is not a challenge to subjective claims *about* BAR/BRI products. Rather, the amended complaint challenges alleged statements of facts concerning the relationship between law school and the New York State bar exam and the New York State bar exam in general, thus allegedly justifying the Defendants' false claims concerning the victim's absolute need for BAR/BRI products. The Plaintiffs' amended complaint alleges that these statements and representations are factually false. The Defendants contend that these statements and representation are factually true. Indeed, the totality of the Defendants' Memorandum can be characterized as an *attempt to prove the statements and misrepresentations at issue to be true!!*

In sum, it is plausible and beyond speculation to conclude that the statements at issue can be proven either true or false. The sufficiency of Plaintiffs claims must be judged on the basis of the challenged BAR/BRI statements concerning their bar review products as same are read in context with the challenged statements concerning the law school experience, the New York State bar examination, and the Defendants' false assertions that induce consumers to believe that there s an indispensable need to purchase a BAR/BRI product in order to pass the New York bar exam.

Context is important in evaluating the message conveyed by BAR/BRI. Indeed, the Plaintiffs' amended complaint does not concern subjective claims about BAR/BRI products, which cannot be characterized as true or false. As BAR/BRI goes to great lengths in its advertising mantras to use deceptive statements and misrepresentations in the hopes of convincing law students why (either prior to graduation or after graduation) each must purchase a BAR/BRI product in order to pass the New York State bar examination there is no general claim of superiority over other bar review products that is so vague that it can be understood as nothing more than a mere expression of BAR/BRI'S opinion. Although the Defendants wish it could be this simple, the assertions set forth in Plaintiffs' amended complaint prove otherwise.

VII. THE DEFENDANTS' ARGUMENT THAT THE PLAINTIFFS HAVE FAILED TO ALLEGE THAT EACH WAS MISLEAD IS WITHOUT MERIT

Incredibly, the Defendants allege that the Plaintiffs have failed to allege that they were misled. On page 2 of their Memorandum the Defendants assert "[t]he implausibility of the plaintiffs claims, in fact, must be apparent even to plaintiffs as they nowhere allege that they themselves were misled by any of BAR/BRI'S advertising." However, in paragraph 38 of the amended complaint, the Plaintiffs clearly allege that they were duped by BAR/BRI's wrongful practices. A simple internet dictionary search sets forth the meaning of "dupe". Attached hereto as Exhibit "A" are copies of said internet dictionary definitions. The first page therein was extracted from Webster's Dictionary which includes in its definition of the word "dupe" (which includes "duped") as "to deceive; to trick." The second page of Exhibit "A" hereto is form WordWeb Online which defines the word dupe as "fool or hoax" and "A person who is tricked or swindled".

In Drew v. Sylvan Learning Center Corporation, 2007 WL 1704610 (Civ. Ct. Kings County June 12, 2007) the Defendant Sylvan Learning Center was found to have violated Sec. 349 via its advertisements concerning its educational services. In its decision the Court stated:

> "This matter falls squarely within the intent to empower consumers who are *duped* (italics added) by businesses, as legislated in General Business Law Sec. 349."

In finding the defendant therein liable for a claim based upon a claim of unconscionability, the Sylvan court admonished the defendant Sylvan by advising that it needed to "re-examine" its strategy in that said strategy "preys" upon "desperate" parents. This rationale is directly applicable to the Defendants herein who, clearly, prey upon vulnerable and unsuspecting law students and graduates who are desperate to pass the difficult New York State bar examination.

VIII. THE AMENDED COMPLAINT ADEQUATELY PLEADS A CLAIM FOR VIOLATION OF THE NEW YORK LAW REGARDING FRAUDULENT INDUCEMENT

Plaintiffs incorporate by reference all of the detailed analysis set forth heretofore herein for the purpose of refuting the Defendants' claims that the Plaintiffs have failed to adequately plead a claim for fraudulent inducement. Accepting all of the facts set forth in the amended complaint as true, as this Court must do in conjunction with the Defendants' Fed. R. Civ. P. 12(b)(6) motion, all of the fraud elements are satisfied as same are set forth in Lerner v. Fleet Bank N.A., 459 F.3d 273, 291 (2d Cir. 2006). Furthermore, the amended complaint satisfies the heightened pleading standard of Fed. R. Civ. P. 9(b) as same are set forth on page 21 of the Defendants' Memorandum.

Indeed, under the Fed. R. Civ. P. 12(b)(6) analysis standards the amended complaint clearly: 1) specifies the statements Plaintiffs contend are fraudulent (as same are part of the advertising mantra which BAR/BRI has used for years); 2) identifies BAR/BRI and its main principal, Richard Convisor, as the speaker of those fraudulent statements; 3) alleges that the Defendants' fraudulent statements were made while the Plaintiffs attended Albany Law School; and 4) in great detail, explains why the Defendants' statements were fraudulent.

Furthermore, the Plaintiffs' amended complaint sets forth facts that give rise to a strong inference of fraudulent intent by alleging facts that: 1) show the operators of BAR/BRI had the motive (i.e. monetary and financial gain) to commit fraud; and 2) show the operators of BAR/BRI had the opportunity to commit fraud (i.e. viciously eliminating many competitors so as to monopolize the New York bar review business). Furthermore, the amended complaint sets forth facts, which standing alone also constitute strong circumstantial evidence of the Defendants' conscious misbehavior and recklessness.

In their Memorandum the Defendants allege that the amended complaint fails to set forth the actual statements made to the Plaintiffs. However, and as stated supra, the example statements contained on the BAR/BRI website do not differ materially from the statements made in other advertisements. Importantly, the Defendants never deny that those very statements contained on the BAR/BRI website as of the date set forth on the exhibits to the amended complaint were the very statements, which were included on the BAR/BRI website and in the many other methods of advertisement described in the amend complaint, at the time Plaintiffs were in law school. Given the nature and uniformity of BAR/BRI deceptive trade practices, the "lack of actual statements" argument advanced by the Defendants must fail. Furthermore, it cannot be said that the amended complaint contains "general" statements made by the Defendants as same are referenced in the case of Abercrombie v. Andrew College, 438 F. Supp. 2d 243, 272-73 (S.D.N.Y. 2006) set forth on page 22 of the Defendants Memorandum.

IX. THE CASES CITED BY THE DEFENDANTS ARE SIMPLY INAPPLICABLE TO THE PLAINTIFFS' AMENDED COMPLAINT

The bulk of the cases which the Defendants rely upon simply cannot support the dismissal of the herein amended complaint pursuant to Fed. R. Cv. P. 12(b)(6). For example, in US Alliance Fed. Credit Union v. Cumins, Inns. Soc., Inc., 346 F. Supp. 2d 468 (S.D.N.Y. 2004) the complaint was dismissed because plaintiff failed to establish that defendant's conduct was consumer oriented. In Shapiro v. Berkshire Life Ins. Co., 212 F.3d 121, 126 (2d Cir. 2000) the Sec. 349 claim was dismissed on summary judgment because their was no *evidence* that the conduct of the defendant was deceptive. In Conboy v. AT&T Corp., 241 F.3d 242 (2d Cir. 2001) the Sec. 349 claim was dismissed because the plaintiff therein: 1) attempted to claim that a violation of General Business Law sec. 601, which does not provide for a private cause of action (i.e. only the New York State Attorney General or a New York District Attorney could allege a violation) constituted a violation of Sec. 349; and 2) failed to indicate how the defendant's conduct was deceptive in any material way. Therein, the Second Circuit Court of Appeals stated:

> "Plaintiffs have not alleged any facts to suggest that (defendant) mislead them; they have not identified any statement......that was false or deceptive. Because a Section 349 violation requires a defendant to mislead the plaintiff in some material way, and plaintiffs have not alleged any type of deception here, the District Court correctly dismissed their claim under New York's General Business Law."

In Solomon v. Bell Atlantic Corp., 9 A.D.3d 49, 777 N.Y.S.2d 50 (App. Div. 1st Dept. 2004). the Appellate Court therein reversed a grant of class certification as the plaintiffs therein failed to demonstrate that questions common to the class predominated over those affecting on individuals and did not demonstrate that all members of the class saw the same advertisements. Moreover, the contents of the challenged advertisements in that case varied widely. Thus, questions of individual members exposure to the alleged deceptive advertising were found to predominate. Also, affirmative defenses raised by defendant would raise individual issues. Solomon is also questionable here as said decision concerned a motion for class certification, not a Fed. R. Civ. P. 12(b)(6) motion to dismiss an amended complaint.

Contrary to the foregoing cases the Defendants' reference to the holding of the New York State Court of Appeals in Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., supra, which is directly applicable to the amended complaint at issue herein. Therein the Court of Appeals found that the plaintiff's claim were "consumer-oriented" as they potentially affected similarly situated consumers. The bank account openings at issue therein were not unique to the plaintiff and defendant bank therein, nor were they private in nature or a single shot transaction. Summary judgment was denied therein as the record was inconclusive as to whether a reasonable consumer in plaintiffs' circumstances might have been mislead by defendant's conduct. Therein the Court of Appeals referred to strong language contained in the Governor's Memorandum approving Sec. 349: "Consumers have the right to an honest market place where trust prevails."

X. MISCELLANEOUS ARGUMENTS

The Defendants' claim that the Plaintiffs could have gained information regarding the consistent pass rate for the New York State bar exam does not free the Defendants from liability for the failure to advise that no BAR/BRI product could alter this fact. It is not that BAR/BRI omitted the fact that the pass rate is controlled, it is the fact that BAR/BRI deliberately failed to inform the Plaintiffs and other consumers that there is no BAR/BRI product available that can alter this fact.

The allegation that Plaintiffs have no claim because they passed the New York State bar examination is irrelevant to the claim of monetary loss due to inflated charges.

The allegation that Plaintiffs have no claim because they purchased BAR/BRI in their third year is baseless. Although the Plaintiffs may have been familiar with law school they had absolutely no experience with the New York State bar examination at the time they purchased the BAR/BRI review course. They simply and unwittingly were duped into relying on BAR/BRI's false and deceptive statements.

The Defendants' claim that they have not alleged any injury is baseless. The amended complaint clearly alleges monetary damages due to payment of an inflated cost.

The claims in the amended complaint based upon the monopolization of the New York bar review business sets forth a claim for violation of Sec. 349 based upon the holding in Gershon v. Hertz Corp., 215 A.D.2d 202, 626 N.Y.S.2d 80 (App. Div. 1st Dept. 1995) holding that omissions may be the basis for a Sec. 349 claim where the business alone possesses information relevant to the consumer and fails to disclose said information. BAR/BRI's advertisements imply that BAR/BRI built its success on merit alone yet much of BAR/BRIs' success is attributable to wrongful acts designed to monopolize the bar review business and eliminate competition. Indeed, only BAR/BRI possesses the information regarding the false, deceptive, and illegal tactics it used and uses to eliminate bar review competition.

XI. PLAINTIFFS SHOULD HAVE THE OPPORTUNITY TO CONDUCT DISCOVERY

A Fed. R. Civ. P. 12(b)(6) motion to dismiss should not be granted if discovery will allow a plaintiff to determine the accuracy of the allegations set forth in the complaint. Denkers v. United Compucred Collections, Inc., 1996 WL 724784 (N.D. Cal.). Here, the plaintiffs should have the opportunity to conduct discovery to prove the accuracy of the allegations set forth in their amended complaint.

CONCLUSION

For the reasons set forth above the Defendants' motion to dismiss the second amended complaint must be denied in its entirety.

Dated: Haines Falls, New York
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Respectfully submitted,

/s/ Robert L. Arleo

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